

# In touch with the law

*The law is constantly changing and this newsletter describes developments which may be relevant to you. If you are in any doubt about these or any other aspects of the law, please make an appointment to see your solicitor.*

## BUYING A PROPERTY

### Protect against new trap between exchange and completion

**Practical steps can be taken to protect purchasers during the time between exchange and completion of purchasing a property.**

In a recent case, purchasers entered into a contract to buy a rural property, but the day before settlement was scheduled a firm of accountants obtained a writ on the property of the vendor for unsatisfied creditors.

The writ was registered a little before settlement. In the following days the purchasers attempted to register the transfer of the property but were advised that the Registrar-General had declined the registration because of the prior regis-

tration of the writ. The sheriff of NSW was then empowered to take possession of the property and to sell it to cover the judgment debt owed to the creditors.

Practical steps which can be taken to protect purchasers during the time between exchange and completion of a contract for sale are lodging a caveat (a legal notice that no step is to be taken that affects the contract without informing the purchaser) and completing a final search of the Land and Property Information (LPI) register at the time of settlement, or as close to the time of settlement as possible.

Contact your solicitor if you would like information on protecting a sale. □



## DISCRIMINATION

### Laws apply to decisions made outside the country

**A blind man who is a third dan black belt was denied entry to a judo world tournament being held in Queensland.**

The man won a gold medal at the Atlanta Paralympics, was awarded the Australian sports medal, and hopes to be con-

sidered for the Australian judo team for both the Olympics and Paralympic Games in Beijing.

The judo organisation held that he couldn't enter the tournament because of his disability.

The organisation is registered in New Zealand, though some of its executive live in Aus-

tralia. The organisation argued that Australian courts were not in a position to hear the case as the decision was made by the organisation outside of Australia.

However, the court decided that where the decision was made did not prevent it from

examining whether the action was unlawful under the Disability Discrimination Act, because the consequences of the decision were felt in Australia, and that if the Act's powers were to be limited in this way, then its impact could be avoided by making decisions offshore. □

# DAMAGES CLAIMS

## Limits on liability for injury

**A hotel patron assaulted by a bouncer may be entitled to common law damages against the bouncer, but in what circumstances would a claim against the hotel fail? This is an important issue whenever someone who inflicted an injury cannot meet a substantial damages claim and the victim wants to bring a claim against a third party with deeper pockets.**

Recent cases and some legal changes have made it clear that a damages claim against a third party liable for the intentional damage of another falls outside the Civil Liability Act, but a claim against the third party in negligence will fall within it. This is consistent with the overall objectives of the Act.

These developments highlight the importance your solicitor will place on distinguishing the differ-



ent bases on which an intentional injury claim might be brought against a third party, and focus attention on the ill-defined boundaries of the law of vicarious liability for intentional injury.

There will be cases where the result reached is arbitrary and arguably unjust. The employer

of a bouncer, with an otherwise impeccable record, who uses excessive force in ejecting a rowdy patron would be liable for the assault and exposed to common law damages.

However, if a bouncer with a known record of unprovoked assaults on patrons commits a

violent and groundless assault on a well-behaved patron, in circumstances found to be outside the course of employment, the employer's liability for negligence in employing the bouncer would be limited under the Civil Liability Act. Contact your solicitor for further information. □

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## PSYCHIATRIC ILLNESS

### When is an employer negligent?

**A doctor working for a major industrial company claimed his employers had failed to take reasonable care to prevent him being exposed to risk of harm at work.**

The doctor had attended a leadership course where, he alleged, he was exposed to significant emotional distress prior to, during and after the course, which caused severe psychiatric injuries.

He argued that the company had breached its duty of care in that a colleague had subjected him to abusive, sarcastic words and aggressive, humiliating conduct. In addition, certain events during the leadership course, he felt, had caused him psychiatric harm. One of his colleagues had been asked to create a human sculpture, placing co-workers in positions that reflected their worth to him,

and he had been placed in a position that showed his lack of importance to the colleague. Further, the colleague had told him he was the cause of all his problems.

Finally, the doctor said that because the company had failed to provide immediate or ongoing medical assistance, he suffered severe psychiatric injury which continued to cause him loss.

The court pointed out that attendance at the course was voluntary, and reiterated the principle that if an employee contractually consents to performing particular tasks it will be harder to prove negligence.

The court also found that it was significant whether or not the employee showed any signs of susceptibility that ought to have put the employer on notice that it was possible its act or omissions might create a risk

of psychiatric harm. This, and not the employee's subjective feelings and perceptions, were significant to the issue of negligence. It is then that an employer would have to take reasonable steps to prevent that risk from eventuating.

It appears that these indicators have to be more than mere

signs of anxiety and stress, especially when the person behaves normally otherwise. The signs must of themselves demonstrate an onset of mental illness.

The courts found that the employer had not breached its duty to provide a safe system of work and the employee's appeal was dismissed. □

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## FIRST HOME BUYER RELIEF

### Trustee parent seen as guardian

**A parent concerned to provide a permanent residence for an adult child suffering from a mental illness has been able to use the first home buyer's entitlement and stamp duty relief.**

The child had not previously held any interest in real estate and the purchase price was below the stamp duty threshold. The trustee parent was held to be a guardian for the purposes of the grant. □

# LONG SERVICE LEAVE

## Federal agreement overrides state entitlement

**The courts have found that where state legislation conferred benefits to employees not provided under the federal legislation, the federal agreement prevailed. As a result, the casual employees in question in the case could not receive long service leave entitlements.**

The Australian Constitution states that where there is inconsistency between Commonwealth and state law, Commonwealth law will prevail. In the area of employment, inconsistencies between federal and state legislation, awards and agreements are important for employers and employees.

Mr X had been employed continuously as a casual employee for over 16 years. A federal agreement did not provide cas-

ual employees with long service leave entitlements, while state legislation did.

The basic question in the case was whether or not the federal agreement intended to cover the relevant field of employment entitlements, thereby excluding any state legislation purporting to enlarge them. This is answered by the test of whether or not the state legislation or instrument alters, impairs or detracts from the operation of

the federal agreement.

In this case the federal agreement covered all employees, casual and non-casual. As such, although casuals were not entitled to long service leave, it was clear that the agreement-makers had considered whether or not they should be given these entitlements. This meant that it was covered by the federal instrument and consequently, the state law was inoperative to the extent of the inconsistency. □

# LAND TAX

## Avoid costly and complex disputes

**Disputing a land tax assessment can be a complex and expensive business, and costs can be disproportionate to the amount in dispute.**

Undaunted, a taxpayer might want to dispute the basis of a land tax assessment, or the underlying valuation of the land on which an assessment is based. If the former, an objection can be lodged with the Office of State Revenue; if the latter, with the Valuer General.

More often than not, land tax disputes involve taxpayers seeking to exempt land from land tax because of the principal place of residence exemption. Examples that have gone to court include whether a married couple could claim two principal residence exemptions, whether adjacent strata title lots owned by the one taxpayer were both exempt from land tax, and the significance of absence from a principal place of residence.

The allowance of the primary production exemption is another problem. For example, land used for training polo ponies was held to be exempt, though in some instances such an activity might be viewed as a hobby.

Objection against a land tax assessment must state grounds

of objection and be lodged within 60 days of service of the assessment, or such later time as the Chief Commissioner allows. If disallowed, the taxpayer may appeal within further time limits.

Land owners or rate-paying lessees can lodge objections to a notice of valuation with the Val-

uer General. Broadly speaking, the grounds upon which objections can be made are limited to the value of the land, faulty descrip-

tions of the area or its dimensions, apportionment of values between people holding different interests or a claim that the person named in a notice is not the owner or lessee of the land.

The Valuer General requires valid supporting evidence with any objection, though this is not

objection allowed.

In practice this is not easy. Normally, objecting to a land valuation is pointless unless the land owner is prepared to commission an independent one. The Valuer General always seems to distinguish the valuation from any information a taxpayer might provide, such as comparable sales.

A decision can be appealed to the Land and Environment Court. If you have a land tax problem, contact your solicitor about how to resolve the dispute in the most cost-effective manner. □

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# TREE TROUBLE

## New law lets you go to court

**New laws are designed to provide a simple, inexpensive and accessible process for resolving disputes between neighbours over trees in metropolitan areas. They give the Land and Environment Court the ability to make orders to remedy, restrain or prevent damage to property or injury to anyone from a tree on adjoining land.**

Historically, it could be claimed that someone committed a private nuisance if their tree's roots invaded someone else's land. Money could be claimed for actual damage suffered, and an aggrieved occupier could cut away roots and branches that projected into their land without notice to the owner of the tree, unless they needed to enter the owner's land to effect such cutting.

The right to lop off branches didn't carry with it the right to pick and appropriate any fruit, however. Fruit, branches and roots removed had to be returned to the neighbour.

It was thought that this law had the potential to escalate disputes, and there was growing dissatisfaction with the operation of the common law in neighbours' disputes about overhanging branches and encroaching tree roots.

A user-friendly section on the new laws on the Land and Environment Court's website has the information needed to pursue a claim, including a Tree Act information sheet. An applicant must complete and file an application form and one or more supplementary forms covering compensation claims, damage to property and risk of injury to people.

The whole process is very swift so applicants and their



solicitors must be ready to go when filing the application. The court conducts preliminary Tree Act conferences monthly to try to help parties reach agreement, specialist part-time commissioners who are professional arborists assist the court,

and from go to whoa the process takes just over two months.

Once the court makes an order there is no need to seek further permission from the council or the heritage council to carry out work ordered by the court, so avoiding double handling. □

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# CONTRACTORS

## Who is held liable when someone gets hurt?

**A customer in a convenience store was injured when she opened a refrigerator to purchase a carton of milk. Its door came off, hitting her on the head, and she suffered injuries to her head, neck and hand. She went to court, arguing negligence.**

There is a distinction in law between employees, for whose conduct an employer is generally liable, and independent contractors, where the person engaging them will generally not be.

When it first went to court, the action against the store's owners and operators failed, but it succeeded against the firm which "maintained or distributed" the refrigerator. The maintenance firm was held liable for the negligence of a mechanic it had

sent to service the refrigerator in response to a complaint that the door was not closing properly.

However, the maintenance firm's solicitors appealed this decision and won. The court concluded that the mechanic was not an employee of the firm but an independent contractor who conducted his own business. He

was engaged from time to time as a contractor to perform maintenance work for the firm, invoicing it for the work he did and any spare parts he used. The firm did not provide him with a uniform, tools or equipment, or any vehicle in which to transport them.

Further, he was not presented to the public as coming from the

firm. His mechanic's van was marked with a name derived from the name of a company of which he was a director.

When determining whether a person may be liable for the acts of another it is vital to determine the law which underpins the relationship. Contact your solicitor if you have concerns. □

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# WILLS

## Can I write my own?

**You can make a will yourself if you wish; printed will forms are available from stationers. There is no requirement that a solicitor draft a will. However, it is not in your best interests to draft your will yourself.**

There have been very many cases where home-made wills were unclear, not properly drawn up or caused an unwanted tax liability.

Many of these cases end up in the courts and they can carry on for years, causing distress and perhaps hardship to

the family of the deceased.

In general, solicitors do not charge a large fee for making a will, and since it is one of the most important legal documents you will ever make, it is false economy to try to do it without skilled professional advice. □